

MESSAGE

FROM THE

PRESIDENT OF THE UNITED STATES,

COMMUNICATING,

In compliance with a resolution of the Senate, a report of the Secretary of State, in relation to the claim of the owners of the ship Miles, of Warren, Rhode Island, against the government of Portugal.

JULY 31, 1848.

Read, and ordered to be printed.

To the Senate of the United States:

I communicate, herewith, a report from the Secretary of State, containing the information called for by the resolution of the Senate, of the 24th of April, 1848, in relation to the claim of the owners of the ship Miles, of Warren, in the State of Rhode Island, upon the government of Portugal, for the payment of a cargo of oil, taken by the officers and applied to the uses of that government."

JAMES K. POLK.

WASHINGTON, July 31, 1842.

DEPARTMENT OF STATE,
Washington, July 24, 1848.

The Secretary of State, to whom has been referred the resolution of the Senate, dated on the 24th of April, requesting the President to furnish to that body, "any correspondence in the Department of State with the American chargé d'affaires in Portugal, in relation to the claim of the owners of the ship Miles, of Warren, in the State of Rhode Island, upon the government of Portugal, for payment of a cargo of oil, taken by the officers, and applied to the uses of that government; also, copies of any correspondence between our chargé and the minister of the Portuguese government, relating to the claim for and the payment of said cargo, together with such papers as are in the department substantiating the claim," has the honor to lay before the President copies of all the papers on file in the Department of State, which are called for by the resolution.

Respectfully submitted,

JAMES BUCHANAN.

To the PRESIDENT OF THE UNITED STATES.

MESSAGE

LIST OF ACCOMPANYING PAPERS.

- Mr. Upshur to Mr. Rencher, No. 2, October 18, 1843.
 Mr. Calhoun to Mr. Rencher, No. 6, May 18, 1844.
 Mr. Rencher to Department of State, No. 4, (extract,) July 15, 1844.
 Mr. Rencher to Department of State, No. 6, (extract,) October 25, 1844.
 Mr. Rencher to Department of State, No. 7, (extract,) January 3, 1845.
 Mr. Rencher to Department of State, No. 9, (extract,) May 7, 1845.
 Mr. Trist to Mr. Rencher, No. 17, September 2, 1846.
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 Mr. Rencher to Department of State, No. 33, (extract and enclosures,) November 8, 1847.
 Mr. Buchanan to Mr. Hopkins, No. 3, February 8, 1848.
 Mr. Hopkins to Department of State, No. 5, (extract and enclosures,) March 29, 1848.
 Mr. Hopkins to Department of State, No. 8, (extract,) June 29, 1848.
 Mr. Upshur to Mr. Colby, October 18, 1843.
 Mr. Taylor to Department of State, (with enclosure,) June 12, 1846.

DEPARTMENT OF STATE,
Washington, July 21, 1845.

The Secretary of State, to whom has been referred the resolution of the Senate, dated on the 24th of April, requesting the President to furnish to that body "any correspondence in the Department of State with the American chargé d'affaires in Portugal, in relation to the claim of the owners of the ship *Miles*, of Rhode Island, upon the government of Portugal, for payment of a cargo of oil, taken by the officers, and applied to the uses of that government; also, copies of any correspondence between our chargé and the minister of the Portuguese government, relating to the claim for and the payment of said cargo, together with such papers as are in the department substantiating the claim," has the honor to lay before the President copies of all the papers on file in the Department of State, which are called for by the resolution.

Respectfully submitted,

JAMES BUCHANAN.

To the President of the United States.

Mr. Upshur to Mr. Rencher.

[No. 2.]

DEPARTMENT OF STATE,
Washington, October 18, 1843.

SIR: I transmit to you copy of a letter addressed to me from New Bedford, Massachusetts, on the 20th July last, by H. G. O. Colby, in behalf of J. R. Wheaton and others, owners of, and interested in, the ship "Miles" and cargo, late of Warren, in Rhode Island, and the memorial and documents which accompanied it, which will fully explain the nature of the case to which they have reference. A copy of the letter which I have just written to Mr. Colby and others is also herewith transmitted; by which you will perceive that the parties have been informed that the matter would be referred to you, with whom they have been desired to correspond directly respecting it, should occasion require; and that you have been instructed to bring the subject to the consideration of the Portuguese government.

You will, upon receipt of this despatch, examine the papers, and address a note to the minister of foreign affairs of Portugal, calling his attention to the circumstances, as set forth in them; and asking for such reparation and redress as the occasion appears to demand. The department offers no opinion upon the merits of the case, or the amount claimed. In the adjustment of any points of difficulty which may arise, you will probably have occasion to refer, for further information, to the parties interested in the case; for whom, I am confident, you will do all that the circumstances of the case will justify.

I am, sir, respectfully, your obedient servant,

A. P. UPSHUR.

TO ABRAHAM RENCHER, Esq., &c., &c., Lisbon.

Mr. Calhoun to Mr. Rencher.

[No. 6.]

DEPARTMENT OF STATE,
Washington, May 18, 1844.

SIR: Referring to a communication to you from this department, dated on the 18th October last, and numbered 2, in behalf of the owners of the ship "Miles" and cargo, formerly of Warren, Rhode Island, I now transmit a letter from W. H. Taylor, of New Bedford, which, as it relates to the same claim, the writer, who states that he acts as agent for the claimants, requests may be sent to you in this manner:

I am, sir, respectfully, your obedient servant,

J. C. CALHOUN.

TO ABRAHAM RENCHER, Esq., &c., &c., Lisbon.

Mr. Rencher to the Secretary of State.

[No. 4.]

LEGATION OF THE UNITED STATES,
July 15, 1844.

[Extracts.]

I received, on the 26th of June last, your despatch, (No. 6,) enclosing me a letter from W. H. Taylor, agent for the owners of the ship Miles and cargo.

I have not thought it advisable to press the claim of the owners of the ship Miles and its cargo to a decision at present. I have thought I would best promote the success of the claim, by deferring it till after the adjustment of the existing difficulties between the government of the United States and that of Portugal. If the bill reported to Congress to reduce the duty upon the wines of Portugal, and to refund duties overpaid, under the treaty of 1840, as understood by Portugal, should become a law, the government of Portugal will be in a better temper towards the claims of the citizens of the United States. I have been somewhat induced to this course by the fate of the claims submitted and urged by my predecessor, the justice of some of which appeared to me very imposing, and yet he spoke very hopelessly of their success. In a few weeks I hope to be informed of the action of Congress, and of the final disposition of this subject; and whatever may be the result, I shall lose no time in urging the Portuguese government to a decision upon this claim as well as others, and shall do all in my power to obtain for them a favorable consideration.

Mr. Rencher to the Secretary of State.

[No. 6.]

LEGATION OF THE UNITED STATES OF AMERICA,
Lisbon, October 25, 1844.

[Extract.]

The claim of the owners, officers, and crew, of the ship Miles, of Warren, Rhode Island, has not yet been decided upon. It has been referred to the department of marine, with a view, I suppose, of obtaining counter statements from Pernambuco. Without such statement, it appears impossible to escape from the payment of a large portion of the claim.

Mr. Rencher to the Secretary of State.

[Extract.]

LEGATION OF THE UNITED STATES OF AMERICA, IN PORTUGAL,
[No. 7.] *Lisbon, January 3, 1845.*

"I have not been able to obtain any decision in the case of the ship Miles, though I have more than once shown some impatience on the subject."

Mr. Rencher to the Secretary of State.

[Extract.]

[No. 9.] LEGATION OF THE UNITED STATES OF AMERICA,
Lisbon, May 7, 1845.

"I received a few days ago, the answer of the government to the claim of the owners of the ship Miles and her cargo. The decision is adverse to the claim. The answer is long, and accompanied by sundry documents. I have directed I. P. Hutchinson & Co., the agent of the owners in this place, to send to Wm. H. Taylor, esq., their agent in New Bedford, a copy of the answer, that they may supply any additional testimony in their power. But I must say that neither the counter-testimony, nor the argument furnished by the Secretary of State, has shaken in the slightest degree my favorable opinion of the claim. I shall therefore continue to urge the claim by such arguments and considerations as appear to me just and reasonable. I should have more hope of success if the finances of the nation were in a better condition."

Mr. Trist to Mr. Rencher.

[Extract.]

[No. 17.] DEPARTMENT OF STATE,
Washington, September 2, 1848.

SIR: Mr. William H. Taylor, of New Bedford, has again written to this department, under date of the 12th June, transmitting copy of a communication made to you, on the 4th April, by the house of I. P. Hutchinson & Co., of Lisbon, respecting the claims of the owners of the ship "Miles" and cargo, of Warren, Rhode Island; and he has requested that instructions may be given you to press

upon the government of Portugal, the prompt settlement of their just demand. Under the instructions already given to that effect, you have acted thus far without accomplishing their object. Now, however, that, at your suggestion, the parties interested have placed in your hands additional evidence, and have written to you fully on the subject, I have to request that you will renew your application in their behalf, and do all in your power to bring the case to a speedy and favorable termination.

* * * * *

I am, sir, respectfully, your obedient servant,

N. P. TRIST.

To ABRAHAM RENCHER, Esq.,
&c., &c., Lisbon.

Mr. Rencher to the Secretary of State.

[Extract.]

[No. 23.]

LEGATION OF THE UNITED STATES,
Lisbon, November 9, 1846.

* * * * *

"Your despatch, instructing me to renew the claim of the owners of the ship Miles and cargo upon the Portuguese government, has also been received. I regret that the claim of the owners of the ship Miles and cargo has not met with more success, and that there should have been so much delay in its adjustment. But the unsettled condition of the country, and the nature of the claim, have rendered delay unavoidable.

"The counter-testimony taken at Mozambique and Pernambuco, controverted some of the facts and statements set forth by the claimants, and I requested, through their agents here, additional testimony if in their power, *but no additional testimony has been furnished.* I think the claim, for the most part, a just one, and shall continue to urge it."

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Mr. Rencher to the Secretary of State.

[No. 33.]

LEGATION OF THE UNITED STATES,
Lisbon, November 8, 1847.

[Extract.]

* * * * *

"The most important claim committed to my charge was that of the owners, officers, and seamen of the American ship "Miles," which, owing to the unsettled state of this country, and the dilatory manner of doing business here, I have not been able to bring to a

successful termination. In the note of Counsellor De Castro, Secretary of State, in answer to one from me presenting the claim, he admitted the justice of some parts of it, but desired further time to enable the government to take testimony as to the *amount*. This was to be done at Mozambique, and other points: Before he was able to obtain this testimony he was driven from power, by the revolution of May, 1846. Since that time, there has been such a succession of changes and vacancies in the foreign office, that I have found it impossible to progress with the claim. In the note of Señor De Castro there is an elaborate argument against the largest amount of the claim, to wit—the cargo of oil. The note was accompanied by an immense mass of testimony on the part of the Portuguese government. A copy of this note was transmitted to the agent of the claimants at New Bedford, that he might furnish additional testimony, if in his power. No additional testimony has been furnished; but their agent here, A. J. Donnel, esq., filed in the legation a very sensible additional argument in support of the claim. Understanding, as I did, the whole claim, I thought I might relieve my successor from much difficulty and embarrassment—on account of the Portuguese language, and, perhaps, somewhat expedite the claim—if, before quitting the legation, I should submit a general argument upon the disputed points in Señor De Castro's note, without waiting longer for the additional note, which had been promised me, upon the points partially submitted. Mr. Hopkins concurred in this view; and I herewith submit for your consideration a copy of my answer to the arguments contained in Mr. De Castro's note. The answer is based upon the testimony submitted by the claimants, as well as that furnished by the Portuguese government. I hope you will find it, what I wished it to be, a complete answer upon all points in dispute. It is, in my opinion, a fair statement of the whole case; and I transmit a copy of it to the department, in the hope that it may aid you in any future action which may become necessary in the prosecution of this just claim."

* * * * *

[Enclosure.]

LEGATION OF THE UNITED STATES,
Lisbon, October 22, 1847.

The undersigned, chargé d'affaires of the United States of America, in answer to the note directed to him by his excellency J. J. Gomez De Castro, former Secretary of State, under date of the 21st of April, 1845, in reply to another forwarded by the undersigned, bearing date the 1st of September, 1844, enclosing a claim made against the government of Portugal by the owners, officers, and seamen of the American ship "Miles," of New Bedford, in the State of Massachusetts, has the honor to remark, that, in the said note of the 21st of April, some parts of said reclamation were reserved for further consideration, to the end that her Majesty's

government might take further information thereon, and the undersigned was promised the honor of an additional note, giving the result of such information. The undersigned, not having received the promised note, feels constrained, as well by the order of his government as by the justice of the claim, to address to Baron De Luz, the actual minister of state, some observations upon the said note of the 21st of April, and documents annexed, in the hope that he may be able to present this claim in such a point of view that her Majesty's government will no longer hesitate to render justice to these claimants, whose property has been taken and applied to repair a national vessel belonging to the government of Portugal.

The undersigned, in the observations which he is about to submit, will confine himself to the more important parts of this claim, and to such a statement of facts as are either admitted by the agents and officers of the Portuguese government, or are so clearly proved in the documents annexed to the claim that they cannot be denied or doubted.

The ship "Miles," of New Bedford, in consequence of damage received at sea, was obliged to put into the port of Mozambique, an island belonging to the Portuguese government, on the 31st of July, 1841, where she was condemned as unseaworthy, and sold. Her cargo, which consisted of sperm oil, was taken out and stored under the direction of the proper officers of the island, who charged and received a large amount of duty upon such exportation—contrary to the universal practice of all civilized nations towards vessels in distress. [Vide doc. No. 8.]

In order to bring the said cargo and crew to the United States, William C. Downs, the master of the said ship "Miles," was compelled to charter of the governor of Mozambique a vessel belonging to the government of Portugal, called the "Real Principe D. Pedro," of which Jeronimo Romero was the commander. By this contract of affreightment the governor of Mozambique promised to put in readiness the ship "Real Principe D. Pedro," and to transport the cargo and crew of the ship "Miles" to Boston, in the State of Massachusetts, for the sum of six thousand dollars, in bills of exchange drawn by William C. Downs upon a mercantile house in Boston, and payable to the agent of the government. [Vide doc. No. 7, and doc. A.]

After this contract was entered into, William C. Downs discovered that the ship "Real Principe D. Pedro" was in an unseaworthy condition, making two inches of water per hour, while lying in the harbor of Mozambique; and he therefore applied to the governor of Mozambique to be released from his contract, and to charter an American vessel, the "Levant," which had arrived since his contract was made with the governor for the "Real Principe D. Pedro," and which he could charter upon more favorable terms. This was refused by the governor, and he was therefore compelled to put his oil on board the ship "Real Principe D. Pedro," unseaworthy as he had found her to be.

The "Real Principe D. Pedro" left Mozambique on the 10th of December, 1841; and it appears from the evidence, both of Captain

Downs and of Commander Romero, that the ship, which was making two inches of water per hour before she left the harbor of Mozambique, was, on the 31st of the same month, without experiencing any storms or very bad weather at sea, making fifteen inches of water per hour, which gradually increased, owing to the rotten state of the vessel, until she was found to be making forty-six inches of water per hour. In this dangerous and sinking state, Commander Romero determined to make for some port of safety; and, falling in with a Portuguese vessel bound for Pernambuco, he resolved to make for the same port, in company with this vessel, where he arrived on the 19th day of February, 1842. (Vide protest of Captain Downs, No. 2, and that of Commander Romero, doc. D and C.)

Soon after the arrival of the ship at Pernambuco, a survey was held on board, and the surveyors declared that the leak was in her bottom, and that she must be hove down; showing, evidently, that the leak existed before she left Mozambique. The surveyors further declared that the expense of repairing the ship would amount to 15 or 16,000,000 Rs., and that her value was 30,000,000 Rs. Thereupon, Commander Romero resolved to sell the cargo and apply the proceeds to the repair of the ship. The oil was therefore sold under the direction of the Portuguese consul, at Pernambuco, against the most earnest protestation of Captain Downs and of the American consul, and the whole of the proceeds applied to the repair of the ship. (Vide doc. No. 2, 19, and doc. M.)

The value of the oil, thus taken and applied to the repair of a national vessel, constitutes a large portion of the claim now preferred against the government of Portugal; and it seems to the undersigned that this simple statement of facts is sufficient of itself to establish the justice of the claim, and to induce the government of Portugal at once to make compensation, not only for the oil actually applied to the repair of the vessel, but also for the oil wasted or purloined, while under the protection of the Portuguese authorities, at Pernambuco.

The undersigned was induced to believe, from the justice and liberality which has heretofore animated the government of Portugal, that, if from any supposed necessity, or misconception of the laws of nations, her officers and agents abroad should seize and appropriate to her use and benefit the property of the citizens of another government, she would, as soon as it was made known to her, hasten to repair that injury by a just and liberal compensation. He is, therefore, surprised to find, in the said note of the 21st of April, opposition made to a claim which seems to him so well founded in justice, and sustained by the commercial codes and usages of the most enlightened and commercial nations.

It is stated in the protest of Commander Romero that he sold the cargo and applied the proceeds thereof to the repair of the ship, because he could not raise money in Pernambuco upon the credit of the Portuguese government. This is an admission that it was the duty of the Portuguese government to repair its own ship, if it could have raised the funds in Pernambuco. Commander Romero

says this could not be done; but the undersigned by no means admits the truth of this assertion. On the contrary, he does not believe it. He cannot believe that 15 or 16,000|000 Rs., the sum at which the repair was estimated, could not have been raised in Pernambuco on the credit of the Portuguese government. The facts show it is not true; for it is remarkable that, while the repair of the ship was estimated at 15 or 16,000|000 Rs., the actual expenditure is put down at 33,865|278 Rs. From this latter sum deduct 15,979|352 Rs., the sum raised by the sale of the oil, and there would remain a balance of 17,882|290 Rs.; most of which must have been raised in Pernambuco upon the credit of the Portuguese government. The reason, therefore, assigned by Commander Romero for having sold the oil, to repair the ship, is not true, in point of fact; though, if it had been true, it would only show the obligation of the Portuguese government to make a just and liberal compensation.

The undersigned, having shown, as he trusts and believes, that this claim is well founded in justice, will now proceed to show that it is equally sustained by the ablest writers on maritime law, and by the commercial codes and usages of the most enlightened nations.

His excellency the Secretary of State, in his said note of the 21st of April, has endeavored to show that this is a case of general average; but the undersigned has sought in vain to find in it a single circumstance which could bring this claim within the principles of general average. When the captain of a ship, at sea, in consequence of stress of weather or otherwise, *voluntarily* cuts away a mast, or throws overboard a part of the cargo, for the safety of the ship and cargo, the ship and the balance of the cargo is made to contribute to the payment of the part thus *voluntarily* sacrificed for their safety and benefit; and each one is made to contribute in proportion to the value of the ship and cargo thus saved. This is what is called general average, and it is just and proper; for, but for the voluntary sacrifice of a mast, or the jactation of a part of the cargo, the whole might have been lost and wrecked. The ship and cargo, thus saved, is bound by the principles of general average to make contribution; but this must be done at the end of the voyage, where alone general average ought to be adjusted. (Vide Stevens and Benecke on General Average, pp. 56, 96 and 268.)

But what circumstance is there in this case which could bring it within the principles of general average? No part of the ship was *voluntarily* sacrificed at sea for the safety of the ship and cargo, and which made it necessary to seek a port of safety. On the contrary, the facts show that the ship was unseaworthy before she left Mozambique; so rotten in her condition, that the leak, which was making two inches of water per hour before she left Mozambique, made forty-six inches per hour before she reached Pernambuco; so rotten in her condition, that the expense of her repair at Pernambuco exceeded, by more than 100 per cent., the estimate made by her surveyors; and so rotten in her condition, that the

expense of her repair far exceeded the estimated value of the ship. To make this a case of general average, and to apply the whole cargo, at an intermediate port, as in this case, to the repair of the ship, and then abandon the voyage altogether, would be such a perversion of the principles of general average, and such a gross act of injustice and fraud, that neither Portugal nor any other enlightened commercial nation would submit to it.

The undersigned will now refer to the laws and usages of some of the most enlightened and commercial nations on this subject.

In England, in the court of king's bench, in a very recent case, "where a ship was compelled to go into port to repair damages *occasioned by tempest*," the court decided, "that the expenses of the repairs themselves were not a subject of general average, nor were the wages and provisions of the crew during her detention in port."—[Vide Maule & Selwin's Reports, page 114.]

In France, where a vessel had considerably suffered by storms, so as not to be able to proceed on her voyage, without a risk of being lost, went into a port for repairs, the court of admiralty at Marseilles decided: "That the charges of repair, the cost of masts, sails, and other apparel purchased, are excluded from general average." Emerigon, who reports this case, adds: "that the practice of the other courts of admiralty of the kingdom correspond with these principles."—[Vide Stevens & Benecke, page 126; Ordonnance de la Marine, tom. 1er, page 625; and Code de Commerce, art. 403, sec. 3ème.]

Such are the principles adopted in the commercial codes of these two great and enlightened nations, on the subject of general average; such are the principles adopted in the courts of the United States; and such are the principles to be found in the commercial code of Portugal herself. In article 1817 of said code it is expressly stated:

"Nao serao reputadas avarias grossas, posto que voluntariamente feitas, e por deliberacoes motivados para bem do navio e carga, as despesas cansadas por vicios internos do navio, por sua inavaliabilidade, on por falta, e negligencia do capitao, on gentes de tripulacao. Todas estas fazem a cargo do capitao, on do navio."

Having shown from the principles of general average, as well as from the codes and usages of the most enlightened nations, that this cannot be considered a case of general average, the undersigned will now submit some observations as to the amount of damages to which the claimants are entitled.

As to the quantity of oil, there can be no doubt. In the protest of Captain Downs, he says there were placed on board the "Real Principe Dom Pedro," at Mozambique, *two hundred and forty-eight casks*, well coopered, filled, and placed on board "*in good condition*." Commander Romero, in the bill of lading, admits that he received this number on board, in the same good condition. Whether these casks contained 800, 850, or 880 barrels, would, of course, depend on the size of the barrel which might be taken as the standard of measurement. What, therefore, the Minister of

State, in his said note of the 21st of April, considers a remarkable contradiction, is more apparent than real.

As to the value of the oil, there can be as little doubt. In the custom-house at Mozambique, where the price of the oil was said to be low, it was valued at 34,092|800; and, in the account of A. J. Nobre, with the ship "Miles," the amount of freight, of which the oil constituted the largest portion, is stated at 42,000|000. [Vide doc. No. 8, and doc. No. 11.]

The value of the oil, whether applied to the use and benefit of the Portuguese government, or allowed to be wasted, while under the care and protection of her authorities at Pernambuco, must fall to as a charge upon the government of Portugal. So, likewise, the losses and damages sustained by the claimants, in consequence of the unseaworthy condition of the "Real Principe Dom Pedro," and her failure to perform the voyage to Boston, according to the contract of affreightment. "It is the first duty of the master," says Abbott on maritime law, "to provide a vessel, tight and staunch, and furnished with all tackle and apparel necessary for the intended voyage." [See, also, Emérigon, tom. 1er, pp. 273, 274, et 275, and Roccus, Not. 19, 57 and 69. Ordonnance Française, Ordonnance von Rotterdam, 2d Magens, page 101, art. 124.] "For, if the merchant suffer loss or damage," says Wellwood, in his "Sea Laws," "by reason of any insufficiency of these particulars, at the outset of the voyage, he will be entitled to a recompense." In "l'Ordonnance Française, Liv. 3eme, tit. 3eme, art. 12," it is said: "Que si le marchand, peut prouver que le bâtiment, au moment de mettre à la voile, se trouve incapable de poursuivre le voyage, le maître du navire doit perdre le frètement et payer à l'armateur les dommages et intérêts." Valin, in his commentary upon this article, cites an observation of Watson, to wit: "That the punishment of the master, in this case, ought not to be thought too severe, because the master, by the nature of the contract of affreightment, is necessarily held to warrant that the ship is good, and in perfect condition to perform the voyage in question, under the penalty of all expenses, damages, and interest."

From all the foregoing facts and considerations, it results that the claimants are entitled to recover:

1st. The money paid into the custom-house at Mozambique, upon the exportation of the oil; which part of the claim is admitted to be just, in the said note of the 21st of April.

2d. The value of the oil placed on board the "Real Principe Dom Pedro," at Mozambique, and which was either sold, and applied to the use and benefit of the government of Portugal, in the repair of one of her national vessels, or allowed to be wasted or purloined, while in the care of and under the protection of the Portuguese authorities at Pernambuco.

3d. The expenses and damages sustained by the claimants, in consequence of the unseaworthy condition of the "Real Principe Dom Pedro," and her inability to perform the voyage to Boston, according to the terms of the contract of affreightment.

4th. These various sums, with interest thereon till paid, constitute the amount of the claim now sought to be recovered from the

Portuguese government; and sustained as it is by the principles of common justice, by the uniform opinions of the ablest writers on maritime laws, as well as by the commercial codes and usages of the most enlightened nations, the undersigned cannot doubt its entire success.

The undersigned avails himself of this occasion to renew to Baron da Luz assurances of the distinguished consideration with which he has the honor to be his obedient servant,

A. RENCHER.

His Ex. BARON DA LUZ, &c., &c., &c.

Mr. Buchanan to Mr. Hopkins.

[Extract.]

[No. 3.] DEPARTMENT OF STATE,
Washington, February 8, 1848.

Sir:

With his No. 33, Mr. Rencher has, you are aware, transmitted to me a copy of his note of the 22d October to M. de Castro, the minister of foreign relations, on the subject of the claim of the owners, officers, and seamen of the American ship "Miles," of New Bedford. You will do all in your power to obtain from the minister a favorable decision in the case.

I am, sir, respectfully, your obedient servant,

JAMES BUCHANAN.

To GEORGE W. HOPKINS, Esq.,
&c., &c., Lisbon.

Mr. Hopkins to the Secretary of State.

[Extract.]

[No. 5.] LEGATION OF THE UNITED STATES.
Lisbon, March 29, 1848.

"I have invited the early attention of the minister of foreign affairs to the claim of the owners, officers, and seamen of the American ship Miles, of New Bedford, in the State of Massachusetts, and enclose, herewith, copies of my note addressed to him upon that subject, and of his reply, (marked B and C). I shall continue to press this claim, and will endeavor to bring it to a favorable decision. I have felt obliged, under the circumstances, to complain of the delay which has already occurred, in terms of the most earnest conviction. If the government of Portugal does not

allow the claim, and provide for its early liquidation, the United States will owe it not less to the violated rights of its citizens, than to its own self-respect, to demand, and coerce indemnity by suitable and efficient measures."

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Mr. Hopkins to the Duke of Saldanha.

[Enclosure.]

LEGATION OF THE UNITED STATES,
Lisbon, March 21, 1848.

SIR: On the 22d of October last, my predecessor addressed a letter to his excellency Baron da Luz, then minister of foreign affairs, in relation to the claim of the owners, officers, and seamen of the American ship "Miles," of New Bedford, in the State of Massachusetts, in reply to another addressed to him by his excellency J. J. Gomez de Castro, a former secretary of state for foreign affairs, under date of the 21st April, 1845. To this letter of my predecessor no reply has been received; and, under recent instructions from my government, it becomes my duty to invite the early and favorable attention of your excellency to the subject. The delay which has already occurred has been attended with great injury to the claimants; and, as I must be permitted to say, in my opinion, under circumstances of peculiar aggravation and hardship.

Your excellency will find, by reference to the history of this transaction, that, without any wrong, or allegation of wrong, on the part of the owners, officers, or seamen of the ship "Miles," their property has been taken without their consent, and without remuneration, and appropriated to the repair of a national vessel belonging to her Majesty's government. Under what circumstances this illegal confiscation of the property of American citizens has been made, it is unnecessary now to speak, as the evidence taken, as well on behalf of the authorities of her Majesty's government, as of the claimants, fully explain them; and I cannot doubt that your excellency will meet the just expectations of my government, and bring this claim to an early and favorable decision.

I will avail myself of this occasion to renew to your excellency assurances of my distinguished consideration.

G. W. HOPKINS.

To his excellency the DUKE OF SALDANHA,
Minister of foreign affairs, &c., &c.

The Duke of Saldanha to Mr. Hopkins.

[Translation.]

Acknowledging the receipt of the note that you directed to me on the 21st instant, in which you urge, by order of your government, the settlement of the reclamation presented by your predecessor, in favor of those interested in the American ship "Miles," I have the honor to inform you that, on this date, I gave knowledge to the senhor minister of marine of the contents of that note; and, as soon as the said minister shall enable me with reply, I will hasten to bring to your knowledge whatever resolution may have been taken concerning that reclamation.

I renew to you the assurances of my highest consideration and esteem.

God protect you. Secretary of State of Foreign Affairs, the 23d of March, 1848.

DUKE OF SALDANHA.

Mr. GEORGE WASHINGTON HOPKINS.

DEPARTMENT OF STATE,
Washington, October 18, 1843.

SIR: The communication which you addressed to me, under date of the 20th of July last, was received a few days since. It was accompanied by a memorial and other documents, intended to set forth and substantiate a claim of the persons interested in the ship Miles and cargo, late of Warren, Rhode Island, for about \$80,000, against the Portuguese government; and believing the claim to be founded in justice, and that the parties are entitled to indemnification, you ask the aid and intervention of the government of the United States to enable you to obtain the reparation in the premises, which you conceive you have a right to demand.

The papers connected with this case will be placed in the hands of Mr. Abram Rencher, who has been recently selected by the President to represent the United States near the government of Portugal, in the place of Mr. Barrow, resigned; and he will be instructed to take an early opportunity, after his arrival at Lisbon, where he will proceed in about a month, of calling the attention of the minister of foreign affairs to the claim you have presented, and of endeavoring to obtain the favorable consideration and action of the Portuguese government upon it, should the facts be found to be accurately stated by you, and that government liable for the alleged injuries.

The claim, with all the papers in its support, being about to be committed to Mr. Rencher, it will be proper for you to correspond

directly with him on the subject, and your communications may be sent through this department.

I am, sir, respectfully, your obedient servant,

A. P. UPSHUR.

H. G. O. COLBY, Esq.,

Acting for J. R. Wheaton and others, owners of the ship Miles and cargo; for William C. Downs, master; for Thomas Smith, mate, and all other persons in interest; New Bedford, Massachusetts.

Mr. Taylor to Mr. Buchanan.

NEW BEDFORD, June 12, 1846.

SIR: I beg leave to lay before you the enclosed copy of a letter from Messrs. J. P. Hutchinson & Co., of Lisbon, addressed to Mr. Rencher, the chargé d'affaires of the United States in that city, concerning the claim of the owners, &c., of the ship Miles, of Warren, R. I., upon the government of Portugal.

The letter exhibits a connected view of the case, and your attention to it is respectfully solicited, in order that, if convinced, as we doubt not you will be, of the justice of our demand, you may be induced to cause such instructions to be given to Mr. Rencher as will empower him to press it to immediate adjustment.

Several years have now elapsed since our property was appropriated to the use of that government, and we are becoming exceedingly anxious to obtain a just remuneration for it, without further delay.

Permit me to hope that the subject may receive your attention, and that Mr. Rencher may be furnished with such advice and instructions from you as the present state of the case may, in your opinion, seem to indicate; for all which the owners, underwriters, officers and men of the ship, will feel most grateful.

I am, &c., &c.,

WM. H. TAYLOR,

Agent, &c., for parties interested.

Hon. JAMES BUCHANAN,

Secretary of State.

LISBON, April 4, 1846.

SIR: Some time back we received from you, for perusal, a despatch with documents addressed to you by the minister of foreign affairs, regarding the claim made on this government by the owners of the ship Miles, of New Bedford, a copy of which we remitted to the agent thereof, from whom we have received a letter requesting us to follow up said claim; in consequence we have now the

honor to address you on that subject, with further observations which we trust will fully substantiate the validity of said claim.

In order to refute the contents of the aforementioned despatch, we will commence from the beginning of the business to which it refers.

The whaling ship *Miles*, in consequence of damages received at sea, put into the port of Mozambique to repair. On arrival, the master, William Downs, had her surveyed, and after ascertaining that she could not be made seaworthy, she was condemned and sold. Her cargo consisted of sperm oil, which was deposited in the custom-house stores, and there kept until reshipped.

The master declared that his ship was violently taken to the anchorage in Mozambique, and thereby greatly injured.

It appears that the master, as his ship was sold, thought it necessary to procure another one to carry the oil to Boston, and made a contract with the governor of Mozambique to charter the government transport "*Real Principe D. Pedro*;" the freight agreed upon was \$6,000 for said oil, and for the passage of the crew of said ship *Miles* to Boston, and it was further agreed that Captain Downs was to sign bills for payment of said freight, which he did. This is certainly a novelty in commerce and hitherto unheard of; the cargo is always responsible for the freight, which is never due until delivered at the port of destination, and we can only account for the governor of Mozambique acting as he did, and making such a clause in the contract with Captain Downs, it being considered by him necessary, in order to exonerate him from any responsibility towards the government of Portugal, to which the transport belonged.

Captain Downs having on his part fulfilled his contract, it was the duty of the governor of Mozambique to do the same, but which he did not do, as instead of delivering the transport in a navigable state, and in every respect fit for the intended voyage, when she was declared ready for sea, she was making two inches of water per hour, as per Captain Romero's protest, dated in Pernambuco, February 2, 1842. The *Real Principe D. Pedro* sailed from Mozambique on the 10th of December, 1841, and was in such a bad state that on the 31st of said month, without experiencing any bad weather, as per aforementioned protest, she sprang a leak, making 15 inches of water per hour, which obliged them to bear away for Pernambuco.

As to the insufficiency of the *Real Principe D. Pedro*, there can be no doubt, and the consequences thereof are ably cited by that enlightened author, Abbot, in his work on maritime law. We will quote his words.

"The first duty is to provide a vessel tight and staunch, and furnished with all tackle and apparel necessary for the intended voyage." Vide also Emerigon, tom. 1, p. 273, 274, 275. Roccus, note 19, 57, 69. Ordinance of Rotterdam, 2 Magens, p. 101, art. 124. Molloy, book 2, ch. 2, sect. 10. Wellwood's sea laws, tit. 7, p. 22. "For if the merchant suffer loss or damage by reason of any insufficiency in these particulars at the outset of the voyage, he will be entitled to a recompense." The French ordinances, liv. 4, tit. 3,

art. 12, directs that if the merchant can prove that the vessel, at the time of sailing, was incapable of performing the voyage, the master shall lose his freight and pay the merchant his damages and interest. Falin, in his commentary on this article, cites an observation of Weitson, that the punishment of the master in this case ought not to be thought too severe, because the master, by the nature of the contract of affreightment, is necessarily held to warrant that the ship is good and perfectly in a condition to perform the voyage in question, under the penalty of all expenses, damages, and interest."

We could quote other writers on this subject, but we consider those above mentioned to be more than sufficient to prove that our assertion as to the insufficiency of the Real Principe De Pedro, when she left Mozambique, to be perfectly correct.

Without having experienced any bad weather during the voyage, as per Captain Romero's protest, the original leak of two inches per hour went on rapidly increasing, owing to the rotten state of the vessel, to forty inches per hour, and she was in such a dangerous and sinking state, and the crew almost exhausted by constant pumping, that Captain Romero was obliged to request the master of a vessel, met at sea, not to abandon them; and, finally, after much exertion, the vessel was got into Pernambuco, where she was put under the charge of the Portuguese consul, as the representative of the government of Portugal, but who certainly never looked into the commercial code of his country, otherwise he would have acted in a different manner than he did. Article 1817, of said code, expressly says:

* * * * *

Soon after her arrival, a survey was held on board, and the surveyors declared that the leak was in her bottom, and that she must be hove down, evidently confirming what has been heretofore stated, that the leak existed before she sailed from Mozambique. The surveyors further declared that the expense of repairing her would amount to Rs. 15 or 16,000||000, and that her value was Rs. 30,000||000.

The minister of foreign affairs is pleased to state that, after the survey, everything was done in accordance with the *universal maritime laws*, under similar circumstances. Now, sir, we deny this *in toto*. According to the maritime laws and customs of the United States and England, and no one will dare to assert that they are behind hand in commercial knowledge, the proceedings in similar cases would have been quite different. We could produce several judicial decisions on the subject, but we consider the two following ones as sufficient. In Philips's book on insurance, you will find the following opinion, emitted in the Supreme Court of the United States by that eminent lawyer Mr. Justice Story, viz:

"In respect to the mode of ascertaining the value of the ship, and, of course, whether she is injured to the amount of half her value, it has, upon the fullest consideration, been held by this court, that the true basis of the valuation is the value of the ship at the time of the disaster; and that if, after the damage is or

might be repaired, the ship is not, or would not be worth, at the place of repairs, double the cost of the repairs, it is to be treated as a technical total loss."

Mr. Chief Justice Parsons considered damage to the ship exceeding half her value, to be a constructive shipwreck. He says:

"When the ship becomes a wreck by any of the perils insured against, it is generally a total loss. The ship becomes a wreck when, in consequence of the injury she has received, she is rendered absolutely unable to pursue the voyage without repairs, exceeding half of her value."

The repairs of the *Real Principe D. Pedro*, at Pernambuco, amounted to more than one hundred per cent.; that is, she was valued at Rs. 30,000||000, and her expenses amounted to Rs. 33,862||278!!! Captain Romero not being able to raise funds to defray said expenses, sold all the oil, although he knew perfectly well that the proceeds thereof would not be enough to pay one-half of the amount; besides, he acted contrary to all maritime laws, which state that a master of a vessel cannot dispose of any one's property until he has complied with the following, viz:

1st. Before he makes known to his owners his situation, requesting them to furnish the necessary funds to defray the expenses.

2d. Before he makes public that he is willing to hypothecate his vessel and cargo, to raise funds.

3d. After having done this, he is justified in selling part of his cargo, but never the whole, except it be of a perishable nature.

As regards the first, it is visible that Captain Romero did not inform his owner, (government of Portugal,) of his situation, although he was eleven months at Pernambuco, because if he had, no one will believe that the said government would have left the vessel to her fate, to be repaired at the expense of other people; and, as regards the second, it does appear that Captain Romero did apply for funds, but such was the bad opinion of the nature of the expenses he had incurred, that 24 commercial houses at Pernambuco refused to advance the amount required.

Captain Romero sold *all* the oil ex his ship, and afterwards the Portuguese consul appointed two arbitrators to make up an account of what he called *general average*, which they made out, including therein every expense incurred during 11 months the ship was at Pernambuco. Such an account may be tolerated there, but in any other country it would be considered a fraudulent transaction, which may be summed up in these words, viz:

That the Real Principe D. Pedro has been well repaired, and in consequence the owner of the oil loses its value, and does not pay a further sum because there was nothing more to take.

Leaving such arbitrators to public censure, we will state what constitutes general average as to be found in Abbott, Stevens and Benecke, on maritime laws; they say: "The modern and approved doctrine on this subject appears to be, that when a ship is obliged

to go into port to repair, it is considered for the benefit of the whole concern, that *the expenses of what is actually applied to the ship are to be sustained by the owner*, but that all other expenses, including unloading and re-loading the cargo, anchorage and pilotage, are subjects of general average."

In the face of such a universal doctrine, how can such an account as made at Pernambuco, deserve any credit; or by what right has the ship to be repaired and the cargo to be sacrificed for her benefit?

What advantage did the owner of the cargo obtain by the ship putting into Pernambuco? Certainly none. It would have been much better for him if the ship had foundered at sea.

If all the foregoing decisions and usages of the most enlightened nations, and the irregular manner in which the business was conducted at Pernambuco, be taken into due consideration, the following must be found to be the result:

1st. That the claim made by the owners of the ship Miles, for value of oil usurped by Captain Romero at Pernambuco, is a just one.

2d. That the Real Principe D. Pedro was in an insufficient state when she left Mozambique, and that all the losses and damages, originating therefrom, must be borne only and solely by the government of Portugal.

We respectfully submit this business to your consideration, and trust you will lay our friends' claim again before the government of Portugal, and that a speedy settlement may result therefrom.

We have the honor to be, sir, &c.,

J. PEMBERTON HUTCHINSON & Co.

Hon. A. RENCHER,

Charge d'Affaires of U. S., in Portugal.

Mr. Hopkins to Mr. Buchanan.

[Extract.]

[No. 8.]

LEGATION OF THE UNITED STATES,
Lisbon, June 29, 1848.

SIR:

* * * * *

My note addressed to the minister of foreign affairs, on the 21st of March last, upon the subject of the claim of the officers, owners and crew of the American ship "Miles" of New Bedford, in the state of Massachusetts, remains unanswered.

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I have the honor to be, &c., &c.,

GEO. W. HOPKINS.

Hon. JAMES BUCHANAN,

Secretary of State.

